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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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| Proceeding | 91202898 |
| Party | Plaintiff L'Oreal USA, Inc. and L'Oreal |
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Serial No. 85/270,272
Published in the Official Gazette on August 2, 2011
For the Mark: FOREAL FORÉAL BY MIKHAIL

L'Oréal S.A. and L'Oréal USA, Inc.,

Opposer,

V.

Opposition No. 91202898

Mikhail Levitin T/A MIKHAIL
LEVITIN INSTITUTE

Applicant.

**OPPOSER'S BRIEF IN OPPOSITION
TO APPLICANT'S MOTION TO DISMISS**

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Opposer L'Oréal S.A. and L'Oréal USA, Inc. (collectively, "L'Oréal" or "Opposer") respectfully submits this brief in opposition to applicant Mikhail Levitin T/A MIKHAIL LEVITIN INSTITUTE's ("Applicant") motion to dismiss L'Oréal's Notice of Opposition pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Applicant's Motion"). In the event the Trademark Trial and Appeal Board (the "Board") treats Applicant's Motion as one for judgment on the pleadings under Rule 12(c), L'Oréal submits this brief in opposition. Finally, L'Oréal respectfully submits that treatment of Applicant's Motion as a motion for summary judgment under Rule 56, would be premature and, reserving all rights, if the Board decides to so treat Applicant's Motion, respectfully requests that the Board first notify the parties and give them reasonable opportunity to present all pertinent evidence and materials.

PRELIMINARY STATEMENT

Applicant refers to its single motion variously as a motion to dismiss for failure to state a claim on which relief can be granted under Rule 12(b), a motion for judgment on the pleadings under Rule 12(c), and a motion for summary judgment under Rule 56. L'Oréal respectfully submits that only a motion for judgment on the pleadings could properly be considered at this time but that, in all events, L'Oréal is entitled to a decision denying Applicant's Motion irrespective of what it is labeled and which of the Federal Rules it is filed under.¹

¹ L'Oréal notes that in addition to Applicant's failure clearly to articulate the nature and basis for its motion, Applicant's Motion fails to comply with the requirements of 37 C.F.R. § 2.126, including that the submission be double-spaced. Further, although the parties agreed to electronic service to the email addresses of record, Applicant's Motion was served on only one of the two email addresses of record for Opposer for this proceeding. Although L'Oréal does not rely on those bases for its opposition to Applicant's Motion, L'Oréal respectfully asks the Board to remind Applicant of the need for all parties, including those acting pro se, to adhere to the requirements for the submission and service of papers in Board proceedings.

L'Oréal's Notice of Opposition sets forth two grounds for opposing registration of Applicant's mark FOREAL FOREAL BY MIKHAIL (in standard character) for "anti-aging cream" in Class 3 ("Applicant's Mark"), namely, likelihood of confusion under 15 U.S.C. § 1052(d) and dilution under 15 U.S.C. § 1125(c). The Notice of Opposition pleads, among other things, L'Oréal's ownership of registrations for various L'ORÉAL- formative marks for cosmetics products in Class 3, L'Oréal's common law rights in its L'ORÉAL marks "in connection with a wide range of personal care products and services, specifically including anti-aging creams, anti-wrinkle creams, and other skin creams," priority of the L'ORÉAL marks over Applicant's Mark, the fame of the L'ORÉAL marks, the similarity between the parties' goods, and the similarity between the parties' marks. In its Answer, Applicant admits L'Oréal's ownership of the pleaded registrations and admits the widespread fame of the L'ORÉAL marks in the United States. Although Applicant's Answer denies that L'Oréal has common law rights in its marks in connection with anti-aging creams, and that the parties' goods and marks are so similar as to create a likelihood of confusion and/or dilution, those are well-pleaded allegations that are susceptible of proof. Applicant's Answer does not raise a defense of failure to state a claim on which relief may be granted; Applicant's Motion to dismiss on that basis therefore is waived. If for some reason Applicant's Motion is determined not to be waived and to be timely filed, Applicant's motion to dismiss for failure to state a claim must be denied because the Notice of Opposition makes clear that L'Oréal has standing and that, if the alleged facts are proven, there is a valid ground for denying registration of Applicant's Mark. Because the Notice of Opposition raises issues of fact that, if proven, would establish that L'Oréal is entitled to judgment denying registration of Applicant's Mark, Applicant's Motion also must be denied if treated as a motion for judgment on the pleadings. Finally, although L'Oréal maintains that it would be premature and improper to treat Applicant's Motion as a motion for summary judgment, the motion utterly fails to meet the standard for the grant of summary judgment in

Applicant's favor, namely, demonstrating the absence of a genuine issue of material fact.

Accordingly, if treated as a motion for summary judgment, Applicant's Motion, again, must be denied.

ARGUMENT

I. Applicant's Right To File A Motion To Dismiss For Failure To State A Claim Has Been Waived

A motion to dismiss for failure to state a claim upon which relief may be granted must be filed before or concurrently with an applicant's answer to the Notice of Opposition. Fed. R. Civ. P. 12(b)(6); Trademark Trial and Appeal Board Manual of Procedure, 3d Ed. (May 2011) ("TBMP") § 503.01; *Western Worldwide Enter. Group Inc. v. Qinqdao Brewery*, 17 U.S.P.Q.2d 1137, 1139 (T.T.A.B. 1990) ("As procedural matter, Fed.R.Civ.P. 12(b)(6) provides that a motion captioned as one to dismiss for failure to state a claim upon which relief can be granted must be filed at or prior to the filing of the answer"). Applicant filed its Answer on December 28, 2011, and did not then or at any time prior thereto move to dismiss for failure to state a claim upon which relief may be granted. Applicant's motion to dismiss under Fed. R. Civ. P. 12(b) at this time – months after the filing of its Answer – must be denied on that basis alone.²

² Without waiving its objection, L'Oréal submits that even if Applicant's motion to dismiss were timely filed, it utterly fails to show that the Notice of Opposition is legally insufficient. L'Oréal's Notice of Opposition "need only allege such facts as would, if proved, establish that the [opposer] is entitled to the relief sought, that is, that (1) the [opposer] has standing to maintain the proceeding, and (2) a valid ground exists for denying the registration sought." TBMP § 503.02. The Notice of Opposition need only state a claim to relief that is plausible on its face; whether an opposer can actually prove the allegations should not be determined on a motion to dismiss, but at a final hearing "or upon summary judgment, after the parties have had an opportunity to submit evidence in support of their respective positions." *Id.* See also *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (to survive a motion to dismiss for failure to state a claim, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'" (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007))); *IdeasOne Inc. v. Nationwide Better Health*, 89 U.S.P.Q.2d 1952, 1953 (T.T.A.B. 2009) ("In order to withstand a motion to dismiss for failure to state a claim, a plaintiff need only allege such facts as would, if proved, establish that (1) the plaintiff has standing to

II. If Applicant's Motion Is Treated As A Motion For Judgment On The Pleadings, It Fails To Meet the Relevant Standard

A motion for judgment on the pleadings is properly filed after the pleadings are closed but prior to the opening of Opposer's testimony period. TBMP § 504; Fed. R. Civ. P. 12(c); 37 C.F.R. § 2.116(e). Where an applicant files a motion to dismiss for failure to state a claim after the answer but prior to the opening of the first testimony period, the Board may treat that motion as a motion for judgment on the pleadings. TBMP § 504; Fed. R. Civ. P. 12(h)(2)(B); *Western Worldwide Enterprises*, 17 U.S.P.Q.2d at 1140 (construing respondent's motion to dismiss, which was filed after respondent's answer, as a motion for judgment on the pleadings, and applying the same standards as those set forth in Fed. R. Civ. P. 12(b)(6)).

A motion for judgment on the pleadings is "a test solely of the undisputed facts appearing in all the pleadings, supplemented by any facts of which the Board will take judicial notice." TBMP § 504.02; *Kraft Group LLC v. Harpole*, 90 U.S.P.Q.2d 1837, 1840 (T.T.A.B. 2009). The motion may be granted only if there is no genuine issue of material fact to be resolved and only if Applicant is entitled to judgment as a matter of law; it may *not* be granted if L'Oréal's pleading raises issues of fact that would establish that L'Oréal is entitled to the judgment it seeks, namely, the refusal of

maintain the proceeding, and (2) a valid ground exists for opposing or cancelling registration of the mark"); *Fair Indigo LLC v. Style Conscience*, 85 U.S.P.Q.2d 1536, 1538 (T.T.A.B. 2007) (same); *Fiat Group Automobiles S.p.A. v. ISM, Inc.*, 94 U.S.P.Q.2d 1111, 1112 (T.T.A.B. 2010) (same). L'Oréal's Notice of Opposition alleges facts sufficient to state a claim. The pleaded registrations and allegations as to common law rights to the L'ORÉAL marks in Class 3 establish L'Oréal's standing to oppose registration of Applicant's Mark, and L'Oréal's allegations regarding fame, similarity of the parties' goods, similarity of the parties' marks, likelihood of confusion, and likelihood of dilution, if proven, would establish L'Oréal's right to a judgment refusing registration of Applicant's Mark. Applicant's Motion does not address, much less call into question, the sufficiency of L'Oréal's Notice of Opposition, other than to state that it shows Applicant's Mark in all capital letters, which is common practice and has no legal relevance, particularly for standard character marks such as Applicant's. Accordingly, because the Notice of Opposition alleges facts that, if proven, establish L'Oréal's standing to maintain the proceeding and valid grounds for denying registration of Applicant's Mark, the motion to dismiss would have to be denied, even if it were timely filed.

registration of Applicant's Mark. TBMP § 504.02; *Kraft*, 90 U.S.P.Q.2d at 1840. In evaluating the motion, the Board must accept all of the well-pleaded factual allegations of L'Oréal (the nonmovant) as true, must take the allegations in Applicant's Answer as false because no responsive pleading to the Answer is permitted, and must draw all reasonable inferences from the pleadings in L'Oréal's favor. TBMP § 504.02; *Kraft*, 90 U.S.P.Q.2d at 1840.

Applicant's Motion does not challenge any allegation in the Notice of Opposition. To the extent that L'Oréal is able to understand Applicant's Motion, Applicant appears to argue that it is entitled to judgment on the pleadings solely because the Notice of Opposition refers to Applicant's Mark in all capital letters – FOREAL FORÉAL BY MIKHAIL – rather than with the capitalization now argued by Applicant, namely, "FOREAL Foréal by Mikhail." Those purported "distinguishing features" in how Applicant's Mark is typed are of no legal significance and do not support a judgment for Applicant.

- Applicant's Mark is not limited to a particular stylization, but rather "consists of standard characters, without claim to any particular font, style, size or color." *See* Application Serial No. 85/270,272, made of record through the pleadings, and Trademark Electronic Application System filing receipt for same, submitted by Applicant with Applicant's Motion. It is therefore immaterial whether the mark appears in the Notice of Opposition in capital letters or in any other stylization.
- Depicting trademarks in capital letters (followed by "(stylized)" or "With Design," when applicable) is a standard convention in trademark practice, including in USPTO Office actions, pleadings, and Board decisions. That Applicant appears to be unfamiliar with that convention does not make L'Oréal's use of capital letters when referring to Applicant's Mark incorrect or relevant.

- Even if Applicant's Mark were limited to the stylization argued by Applicant, Applicant's Motion fails to address how that stylization obviates the similarities between Applicant's Mark and L'Oréal's L'ORÉAL marks. To the contrary, based on the pleadings construed in favor of L'Oréal – as they must be – there is at least an issue of material fact as to whether Applicant's Mark is so similar to L'Oréal's marks as to create a likelihood of confusion or dilution.

Applicant's Answer expressly admits that L'Oréal owns federal registrations for various L'ORÉAL- formative marks for goods in Class 3. Applicant's Answer also expressly admits that the L'ORÉAL mark is famous in the United States. In addition to those of L'Oréal's allegations that Applicant has expressly admitted, the Board must accept as true all of L'Oréal's remaining well-pleaded allegations, including L'Oréal's allegations regarding its common law rights to L'ORÉAL- formative marks in connection with anti-aging cream, the similarities between the parties' products, and the similarities between the parties' marks. Although Applicant's Answer purports to deny the similarities between the marks by stating that the FOREAL element of Applicant's Mark is a contraction of FOR REAL (i.e., FO' REAL), it is a matter of record that Applicant's Mark is FOREAL FOREAL BY MIKHAIL, *not* FO'REAL FO'REAL BY MIKHAIL. To the extent that Applicant's Answer alleges that consumers nonetheless would view and pronounce the FOREAL element as "fo' real," that is a disputed issue that is not supported by any evidence of record and may not be construed in favor of Applicant on a motion under Rule 12(c). The parties may submit evidence and present arguments at trial regarding the similarity of their respective marks and goods, the likelihood of confusion, and the likelihood of dilution, but the only reasonable inference to be drawn at this stage is that the facts alleged in L'Oréal's Notice of Opposition, if proven, would entitle L'Oréal to a judgment refusing registration of Applicant's Mark. Taking the factual

allegations in L'Oréal's Notice of Opposition as true and drawing all reasonable inferences from the pleadings in L'Oréal's favor, as is required, it is clear that L'Oréal's pleadings are sufficient to defeat Applicant's Motion. The motion for judgment on the pleadings therefore must be denied.

III. Treating Applicant's Motion As A Motion For Summary Judgment Would Be Premature And Improper, But, If So Treated, Applicant Has Failed to Meet Its Burden And the Motion For Summary Judgment Must Be Denied

Applicant's Motion indicates that, in addition to being a motion to dismiss and a motion for judgment on the pleadings, it may be treated as a motion for summary judgment. Unless a motion for summary judgment asserts lack of jurisdiction, res judicata, or collateral estoppel, it may not be filed until the moving party has made its initial disclosures. TBMP § 528.02; 37 C.F.R. § 2.127(e)(1).

A motion filed prior to initial disclosures is premature. *Id*; *Qualcomm, Inc. v. FLO Corp.*, 93 U.S.P.Q.2d 1768, 1769-70 (T.T.A.B. 2010) (motion for summary judgment denied as premature where movant had not yet served initial disclosures). *See also Compagnie Gervais Danone v. Precision Formulations LLC*, 89 U.S.P.Q.2d 1251, 1255 n.7 (T.T.A.B. 2009) ("if a party moves for summary judgment prior to the deadline for making initial disclosures it should indicate in its motion that the disclosures have been made, or are not required because the motion seeks judgment on claim or issue preclusion, or on a jurisdictional issue"). Although the parties in this opposition proceeding waived the requirement to file initial disclosures apart from the ordinary discovery process, the consented motion setting forth that waiver merely defers exchange of such information and clearly contemplates that the parties will provide the initial disclosure information, stating that the parties "agree ... to rely on traditional discovery requests to obtain information that might have been provided through the service of initial disclosures." *See* Motion on Consent to Amend Disclosure and Discovery Procedures, filed March 15, 2012, noted by the Board on March 29, 2012. Neither party has yet served discovery requests, nor has either provided the other with information that

might have been provided through initial disclosures. Under those circumstances, a motion for summary judgment is premature and should be denied on that basis alone.

Further, a motion for summary judgment is an appropriate time- and expense- saving device “when a party is able to demonstrate, prior to trial, that there is no genuine issue of material fact, and that it is entitled to judgment as a matter of law” because evidence beyond what is already available in connection with the summary judgment motion “could not reasonably be expected to change the results in the case.” See TBMP §§ 528.01, 528.02. See also *Hewlett-Packard Dev. Co. v. Vudu Inc.*, 92 U.S.P.Q.2d 1630, 1631 (T.T.A.B. 2009); *S & L Acquisition Co. v. Helene Arpels Inc.*, 9 U.S.P.Q.2d 1221, 1225 (T.T.A.B. 1987); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Where, as here, the pleadings include well-pleaded allegations of material fact that the movant disputes but offers no evidence to rebut, a motion for summary judgment is premature and cannot stand. Rather, a motion for summary judgment that is submitted without any supporting evidence “is the functional equivalent of a motion to dismiss for failure to state a claim upon which relief can be granted or of a motion for judgment on the pleadings.” TBMP § 528.04 (internal citations omitted); *S & L Acquisition Co.*, 9 U.S.P.Q.2d at 1225 n.9 (“Where a party moves for summary judgment without supporting evidence, it is settled that such a motion is the functional equivalent of a motion for judgment on the pleadings”) (citing 6 Moore's Federal Practice P56.09 at 56-167 (1985)).

As argued above, if the Board treats Applicant's Motion as a motion for judgment on the pleadings, the motion should be denied because Applicant has failed to show that there is no issue of material fact or that it is entitled to a judgment as a matter of law. If the Board treats Applicant's Motion as a motion for summary judgment, it should deny the motion as premature or unsupported, without even reaching the merits. However, if the Board chooses to reach the merits of a motion for summary judgment, Applicant respectfully requests that the parties be given notice thereof and a

reasonable opportunity to marshal and submit all pertinent evidence. If the Board elects to proceed with considering Applicant's Motion as a motion for summary judgment without providing such notice and opportunity, Applicant reserves all of its rights with respect to such a decision but, without waiving any of those rights, respectfully argues that Applicant's Motion must be denied because Applicant has failed to identify and address, much less demonstrate the absence of, disputed issues of material facts.

A motion for summary judgment may be granted if the pleadings, the discovery and disclosure materials on file, and any affidavits establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. TBMP § 528; Fed. R. Civ. P. 56(c). A fact is "material" if it may affect the outcome of the proceeding, such that the finding of the fact is relevant and necessary, and there is a "genuine issue" if a reasonable fact finder could decide in favor of the non-moving party. TBMP § 528.01; *Institut National Des Appellations d'Origine v. Brown-Forman Corp.*, 47 U.S.P.Q.2d 1875, 1879 (T.T.A.B. 1998) ("[a]n issue is material when its resolution would affect the outcome of the proceeding"); *Opryland USA Inc. v. The Great Am. Music Show Inc.*, 23 USPQ2d 1471, 1472 (Fed. Cir. 1992) (a dispute is genuine if evidence could lead reasonable finder of fact to decide question in favor of non moving party). The party that moves for summary judgment has the initial burden of establishing the absence of any issue of material fact, and that it is entitled to judgment as a matter of law. TBMP § 528.01. The moving party's burden on a motion for summary judgment is greater than the evidentiary burden at trial. *Id.* If the moving party meets its burden, the non-moving party must submit countering evidence to show that there is a genuine factual dispute regarding one or more items, which would be better resolved on a full record at trial. *Id.* See, e.g., *Opryland USA Inc.*, 23 U.S.P.Q.2d at 1472 the non-moving party is not required to present its entire case, but must present enough evidence to show that there is an evidentiary conflict regarding the issue being disputed). The Board must construe

the evidentiary record and all inferences to be drawn from the undisputed facts in the light most favorable to the non-moving party, and must give the non-moving party the benefit of all reasonable doubt regarding whether there are genuine issues of material fact. TBMP § 528.01; *Institut National Des Appellations d'Origine*, 47 U.S.P.Q.2d at 1879 (“The nonmoving party must be given the benefit of all reasonable doubt as to whether genuine issues of material fact exist, and the evidentiary record on summary judgment, and all inferences to be drawn from the undisputed facts, must be viewed in the light most favorable to the nonmoving party”); *Opryland USA Inc.*, 23 U.S.P.Q.2d at 1472 (non-movant’s evidence is to be believed and all justifiable inferences drawn in its favor).

Applicant has failed to submit any evidence or to meet its initial burden of demonstrating the absence of any genuine issue of material fact or of establishing that Applicant is entitled to judgment as a matter of law. Based on the pleadings, there are genuine issues of material fact regarding, among other things, L’Oréal’s common law rights in L’ORÉAL and L’ORÉAL-formative trademarks in connection with anti-aging creams, the relatedness of the parties’ goods even if L’Oréal did not have rights in connection with anti-aging creams, and the similarity of the parties’ marks. Applicant’s Motion does not dispose of any of those disputed facts. Indeed, Applicant’s Motion asserts nothing more than a baseless argument that L’Oréal “has no actions on the pleadings” because the Notice of Opposition showed Applicant’s Mark in solid capital letters. Apart from the indisputable fact that the application for Applicant’s Mark is for a standard character mark, not a stylized mark or a mark with design, Applicant’s Motion in no way addresses -- much less establishes the absence of -- genuine issues of material fact, including likelihood of confusion and/or dilution. Because Applicant has failed to meet its initial burden and all reasonable doubt regarding whether there are genuine issues of material fact must be resolved in L’Oréal’s favor, Applicant’s Motion for summary judgment (if the Board treats it as such), must be denied.

In addition, if Applicant had met its burden of demonstrating the absence of any genuine issue of material fact, L'Oréal should be given notice of the Board's intent to treat Applicant's Motion as a motion for summary judgment and reasonable time in which to present evidence in opposition. Such evidence would establish that L'Oréal has superior common law rights in L'ORÉAL and L'ORÉAL- formative marks in connection with anti-aging creams and is entitled to very broad protection of its L'ORÉAL marks with respect to those products, demonstrating that (if Applicant continues to dispute such rights) there remains a genuine issue of material fact regarding L'Oréal's common law rights to use of L'ORÉAL in connection with anti-aging cream in addition to the factual disputes regarding similarities between the parties' marks and the resulting likelihood of confusion and/or dilution. The evidence likely would include newspaper and magazine articles that refer to anti-aging products sold under the L'ORÉAL trademark as well as images of L'ORÉAL anti-aging products and affidavits from those with personal knowledge of L'Oréal's anti-aging products. Specifically, given reasonable time to respond, L'Oréal would submit evidence showing that L'Oréal not only has made long-standing and widely-recognized use of the L'ORÉAL marks in connection with anti-aging creams, but also consistently ranks among the top five brands for anti-aging products sold at mass retailers in the United States, with tens of millions of dollars in annual sales of anti-aging products under the L'ORÉAL brand. Applicant's Answer (though not Applicant's Motion) disputes that L'Oréal has rights in the L'ORÉAL marks in connection with anti-aging products. That one genuine issue of material fact alone precludes granting summary judgment.

L'Oréal also would submit printouts, *inter alia*, from the USPTO Web site, showing that the goods contained in L'Oréal's pleaded registrations and the anti-aging creams identified in Applicant's Application are often offered by a single entity under a single mark. That evidence would indicate that even leaving aside L'Oréal's significant common law rights, the parties' goods are sufficiently

similar to support a refusal to register Applicant's Mark. Applicant's Answer (though not Applicant's Motion) disputes the similarity of the parties' goods. To the extent that there is any question, such evidence would therefore demonstrate that there is at least one other genuine issue of material fact regarding the similarity of the goods.

A non-movant need not prove its entire case on the merits when opposing a motion for summary judgment. It need only proffer sufficient evidence to demonstrate that there remains a genuine issue of material fact and that the movant is not entitled to judgment as a matter of law. It need not even do that where, as here, Applicant failed to meet its initial burden. In all events, however, it is evident that genuine issues of material fact exist. Giving L'Oréal the benefit of all the reasonable doubt regarding whether there are genuine issues of material fact, and construing the limited evidence and the pleadings in a light most favorable to L'Oréal, as is required, the Board must deny Applicant's motion for summary judgment, or provide L'Oréal with notice and a reasonable time to submit evidence.

CONCLUSION

Applicant's Motion is deficient on many levels. It is not clear what the nature of the motion is, *i.e.*, whether it is a motion to dismiss, a motion for judgment on the pleadings, or a motion for summary judgment. L'Oréal respectfully submits that it is most properly viewed as a motion for judgment on the pleadings but that, in all events, Applicant's Motion must be denied. It appears that the only argument set forth in Applicant's Motion is that L'Oréal's Notice of Opposition rendered Applicant's Mark in solid capital letters, that Applicant's Mark in fact should appear as "FOREAL Foréal by Mikhail," and that those "distinguishing features" of how Applicant's Mark is depicted somehow mean that "Opposer has no actions on the pleadings." Applicant's Motion, at 2. That argument is entirely without merit or legal authority, particularly in light of the fact that

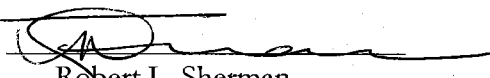
Applicant applied for Applicant's Mark in standard characters. Considered alone, the argument in Applicant's Motion cannot suffice to support a motion to dismiss, motion for judgment on the pleadings, or motion for summary judgment, and Applicant's Motion therefore should be denied. Even being generous and considering the arguments that Applicant (improperly) set forth in its Answer, however, would not save Applicant's Motion. Taking L'Oréal's well-pleaded allegations as true, construing all reasonable inferences in L'Oréal's favor, and taking into account the pleadings, it is clear that L'Oréal's Notice of Opposition states a valid claim so as to defeat a motion to dismiss, and that there exist genuine issues of material fact that preclude a judgment on the pleadings or the grant of a motion for summary judgment. Applicant's efforts to have the proceeding dismissed under Fed. R. Civ. P. 12(b)(6), 12(c) or 56 must fail. A review of the pleadings and precedent makes clear that the Board should deny Applicant's Motion and allow the claims to be tried on their merits.

Dated: May 15, 2012

Respectfully submitted,

PAUL HASTINGS LLP

By:



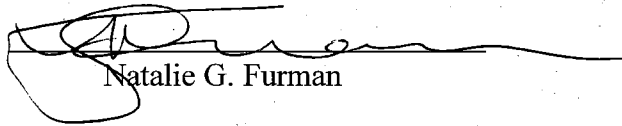
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 15, 2012, a true and complete copy of the foregoing **OPPOSER'S BRIEF IN OPPOSITION TO APPLICANT'S MOTION TO DISMISS** was served on Applicant electronically, as agreed upon by the parties, by sending said copy by email to Mikhail Levitin at vitality@ptd.net.


Natalie G. Furman